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No. 86-1691

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

TONY RAYBURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence recorded telephone conversations that were seized during a warrant-authorized search.

Petitioner and four others were charged in an indictment returned in the United States District Court for the Western District of Tennessee. The indictment charged them with conducting an illegal gambling business, in violation of 18 U.S.C. 1955; conspiracy to violate federal gambling laws, in violation of 18 U.S.C. 371; and accepting wagers without paying the federal wagering tax, in violation of 26 U.S.C. 7262. Petitioner moved to suppress tapes of gambling-related conversations that were seized in a warrant-authorized search of a "wire room" that petitioner and his co-defendants had allegedly used for illegal gambling. Petitioner argued that the use of the tapes as evidence was prohibited by the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. III) 2510 *et seq.* He relied

in particular on 18 U.S.C. 2511(2)(d), which permits surreptitious recording by a party to a conversation, except when the interception is "for the purpose of committing any criminal * * * act in violation of the * * * laws of the United States or of any State." He also relied on 18 U.S.C. 2515, which prohibits the receipt of illegally intercepted conversations in evidence "in any trial."

On March 6, 1986, the district court granted the motion. It rejected the argument that suppression was contrary to the purposes of the wiretap statute. On the government's appeal, the court of appeals reversed. It found that neither the general purpose of Title III to protect the privacy of parties nor the particular purpose of Section 2511(2)(d) to prevent the misuse of the contents of intercepted communications would be served by suppression in the context of this case. The court of appeals concluded that the parties to the conversations waived their right of privacy by the deliberate act of recording them. In addition, the court concluded that Congress did not intend for Section 2515 to shield the very persons who conducted the interceptions from the consequences of their own acts (Pet. App. 1-14).

Petitioner contends (Pet. 18-47) that a proper construction of the federal wiretap statute bars the use of the fruits of interceptions made for the purpose of committing a criminal act such as illegal gambling. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final

judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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